No. 95-780

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MAHESH K. SINGH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court, Appellate Division, Second Department, State of New York

REPLY BRIEF FOR PETITIONER

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10 pp

FURTHER REASONS FOR GRANTING THE WRIT

I.

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT UNDER 28 U.S.C. § 1257.

Respondent is incorrect in contending that Petitioner lacks the jurisdictional basis for seeking the grant of a petition for writ of certiorari. It is clear that Petitioner raised the issue of the excessiveness of his sentence at the earliest possible moment, *i.e.*, before the trial court and before the Appellate Division and in submissions to the New York Court of Appeals. The petition for a writ of certiorari clearly sets forth how the excessive sentence issue was originally raised (Petition for a Writ of Certiorari at pp. 4-5 and in Appendices D and F). This federal issue was preserved for appeal. As stated in Petitioner's Application for Reconsideration of Denial of Leave to Appeal, he "was punished for exercising his constitutional right [to a trial]. Such punishment is violative of fundamental rights protected under both the United States and New York Constitutions.[1] App. A, 1a.

Petitioner has tried in vain to obtain a reversal of the sentence which so obviously was excessive and apparently vindictive. Respondent is disingenuous in urging that Petitioner has misconceived the failure of the New York Court of Appeals to grant review. Petitioner made quite clear that the declination of the New York Court of Appeals to grant review ". . . is not evidence of any substantive determination. . . ." (Petition for a Writ of Certiorari at p. 8). Petitioner understands that the declination is not evidence of a substantive determination, but the declination cannot be thoroughly ignored inasmuch as it has

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1. A copy of the relevant section of this document is attached as Appendix A.

served, Petitioner contends, to perpetuate the constitutional violation that can only be remedied by this Court.

II.

THE PROTECTIONS OF *NORTH CAROLINA V. PEARCE* SHOULD BE EXTENDED TO THIS CASE.

Other than its lengthy quotes from the relevant cases, with which the Petitioner assumed the Court was familiar, the Respondent does little to address the points made by the Petitioner in his petition for certification. There are two issues presented by the Petitioner: presumption of vindictiveness and actual vindictiveness.

Respondent misses the point with regard to the presumption of vindictiveness. Everyone agrees that under *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) there is a presumption of vindictiveness where a defendant's sentence on retrial is greater than it was following the first trial. It is the Petitioner's position that the presumption of vindictiveness should be expanded to include cases where the sentencing judge sentences the defendant to a sentence many times greater than that recommended by the prosecution after a defendant has refused to plead guilty. This is a new issue for this Court and it should be addressed. It is not Petitioner's position that this presumption should necessarily apply to cases where the sentencing judge sentences a defendant to a sentence greater than was offered with a guilty plea. The prosecution's recommendation for sentencing Petitioner was already higher than that offered with the guilty plea and Petitioner does not argue that the prosecution's proposed sentence, had it been adopted by the sentencing judge, would have been constitutionally defective. Thus, the case of *Corbitt v. New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978) is irrelevant to this petition.

It is the Petitioner's contention that the same concepts that were the basis for the Court's decision in *North Carolina v. Pearce*, even as addressed in *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), apply to the circumstances of Petitioner's case. The protections of *Pearce* were meant to guard against the vindictiveness of the sentencing judge. The Court stated in *Alabama v. Smith* that it has limited the application of the presumption of vindictiveness "to circumstances where its objectives are thought more efficaciously served," *i.e.* circumstances "in which there is a 'reasonable likelihood' that an unexplained increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." 490 U.S. at 799 (citations omitted). Petitioner submits that where the sentencing judge imposes a sentence nine times greater than that recommended by the prosecution, that is just the kind of circumstance where the objectives of the presumption of vindictiveness would be efficaciously served.

Respondent states that the Petitioner must prove actual vindictiveness (Respondent's Brief p. 6). Petitioner has already asserted that there was actual vindictiveness in this case based upon the language in the transcript from the sentencing of the Petitioner by the trial judge. Respondent points to case law indicating that the sentencing judge may sentence the defendant to a higher sentence than he would have received if he had pled guilty. (Respondent's Brief p. 7). Again, the Respondent misses the point. In this case the sentencing judge sentenced the defendant to a sentence greater than he would have otherwise imposed, specifically because he knew of the plea bargain that the prosecutor offered to the defendant and he thought that the defendant should have accepted it. Because the defendant did not do so, the judge increased the sentence, in order to punish the Petitioner for putting the court and the state to the time and trouble of conducting a trial. The sentencing judge's own language on this issue is clear.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: January 5, 1995

APPENDIX A — EXCERPT FROM PETITIONER'S APPLICATION FOR RECONSIDERATION OF DENIAL OF LEAVE TO APPEAL

THE STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

MAHESH K. SINGH and GEORGIA PERRY-RACCIS,

Appellants.

APPLICATION FOR RECONSIDERATION OF DENIAL OF LEAVE TO APPEAL

RELIEF SOUGHT: Reconsideration of certificate denying leave to appeal and continuation of bail

ATTORNEY FOR DEFENDANT: Barry H. Evenchick, 2 West Northfield Road, Livingston, New Jersey 07039; Russo, Fox & Karl, 400 Townline Road, Hauppauge, New York 11788

ATTORNEY FOR PEOPLE: James M. Catterson, Jr., District Attorney of Suffolk County, Center Drive South, Riverhead, New York 11901

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III. *The Cruel and Unusual Punishment Issue*

Appellant, Mahesh Singh, received a prison term from the trial judge of one and one-half to four and one-half years in prison, apparently by way of punishment for having elected to stand trial and be adjudged by a jury of his peers. No other conclusion can be reached. The People recommended at sentencing that Mr. Singh receive six months with five years' probation. In response to that recommendation, the judge stated:

> "You raise an interesting point here. He's an educated man who denies his guilt and now wants mercy as if he could just come in here and say to this community and society, the amount of money it cost to run the court,

plus trying to put me in a no-win position of being fair to everybody else. Why did he stand trial? You are intimating that he committed the crime and if he committed the crime, what we say, he can't lose, can he? That's my moral problem. You know, you work in these courts, and the object of — the high numbers come through here, dispose of charges, first offenders as well as everybody else. You can't have it both ways.

"The jury found you guilty. The manpower, everything else, if you came in originally, you would have gotten — it is normal to admit his guilt and be on probation."

(Transcript of indeterminate sentence, December 19, 1993, pages 6, lines 16 to 25 and page 7, lines 1 to 13, pages 6 and 7 being attached hereto as Exhibit "C").

The Constitutions of the United States and of the State of New York prevent the imposition of cruel and unusual punishment (U.S. Const. 8th Amdt; N.Y. Const. art. 1, sec. 5). The question which does not appear to have been decided by this Court, which is in need of resolution, is whether, as here, when a sentencing judge impliedly admits to the imposition of a sentence greater than would have been the case had the defendant not put the People to the test through the exercise of the right to trial by jury, a lesser sentence would have been imposed.

Appendix A

The irresistible conclusion to be drawn from the remarks of the trial judge at sentencing is that Mahesh Singh was punished for exercising his constitutional right. Such punishment is violative of fundamental rights protected under both the United States and New York Constitutions. This Court, it is urged, should not countenance the punishment of a person, except upon a charge and opportunity for hearing.

There was no suggestion in this case that Mahesh Singh was guilty of perjury or that he was convicted for that crime. Certainly fundamental fairness and due process would be offended if further punishment were inflicted upon him for that crime, even if he were not charged with it and were not tried for it. That precept is what underlies decisions on this subject, and the conclusion of those courts which have considered it that,

> "... the right to defend would be unduly burdened if a defendant understood that, if convicted, his mere denial of the charge under oath would without more lead to successive convictions for perjury until he or the State was exhausted ... We here refer to the values embarrassed by a perjury prosecution in order to stress the wrongfulness of including in a sentence something extra upon a belief that the defendant lied in asserting his innocence...." (*State v. Poteet*, 61 *N.J.* 493, 496, 295 *A.2d* 857 (1972)).

The foregoing quote by the late Chief Justice Joseph Weintraub of the New Jersey Supreme Court expresses well

the problem presented by the present case. It would be plainly and fundamentally unfair, it is submitted, for a person to have to serve a prison sentence obviously longer than would otherwise have been the case solely because of the election to stand trial. The trial judge here clearly was miffed that the defendant did not plead guilty. The judge sent a message to other defendants, through this sentencing, that such would not be countenanced and that, upon a jury verdict of guilty, additional punishment would be imposed in the form of a longer sentence than prescribed or recommended. That is precisely what the Constitutions of the United States and New York prevent. It is urged that this question cries out for consideration at this time by this Court."***

* * * *

*** There can be no doubt that defense counsel did everything reasonably possible to persuade the sentencing judge that a sentence no greater and even less than that being recommended by the People was appropriate. The remarks were ignored by the sentencing judge, but are presented herewith as Exhibit "D" (pages 2 through 5 of the transcript of indeterminate sentence of December 17, 1993) because they speak to the efforts made by defense counsel to prevent this issue from arising.